

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
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6 UNITED STATES OF AMERICA) 15CR142
7 vs.)
8 GREGORY WILLSON, ET AL.) Buffalo, New York
9 Defendant.) September 21, 2016
10 1:15 p.m.
11 - - - - - X

12 **Appeal of Magistrate Judge's Decision and Order**

13 TRANSCRIPT OF PROCEEDINGS
14 BEFORE THE HONORABLE ELIZABETH A. WOLFORD
15 UNITED STATES DISTRICT JUDGE
16

17 WILLIAM J. HOCHUL, JR., ESQ.
18 United States Attorney
19 BY:JOSEPH TRIPI, ESQ.
20 BRENDAN T. CULLINANE, ESQ.
21 Assistant United States Attorney
22 138 Delaware Avenue
23 Buffalo, New York 14202

24 BARRY NELSON COVERT, ESQ.
25 Lipsitz, Green, Scime, Cambria, LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202

REETUPARNA DUTTA, ESQ.
Hodgson Russ, LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, New York 14202

COURT REPORTER: Karen J. Bush, Official Court Reporter
Karen_bush@nywd.uscourts.gov
100 State Street
Rochester, New York 14614

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USA VS. G. WILLSON, ET AL

CONTINUATION OF APPEARANCES

MARK J. MAHONEY, ESQ.
Harrington & Mahoney
70 Niagara Street, Third Floor
Buffalo, New York 14202

P R O C E E D I N G S

* * *

THE CLERK: Criminal action, 2015-142, United States versus Gregory Willson, et al, oral argument. Counsel, please state your name and the party you represent for the record.

MR. TRIPI: Joseph Tripi for the United States and Brendan Cullinane for the United States.

THE COURT: Good afternoon.

MS. DUTTA: Reena Dutta for defendant, Tom Scanlon.

THE COURT: How do you pronounce the last name?

MR. DUTTA: Dutta.

THE COURT: Good afternoon, Ms. Dutta. Mr. Mahoney is here. And we have Mr. McIndoo?

DEFENDANT MCINDOO: Yes.

THE COURT: Mr. McIndoo, good afternoon.

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2 And is Mr. Scanlon here?

3 MS. DUTTA: He is in the courtroom.

4 THE COURT: Good afternoon, sir.

5 MR. COVERT: Barry Covert on behalf of Andre
6 Jenkins.

7 THE COURT: And is Mr. Jenkins here?

8 MR. COVERT: He is here, in the white shirt.

9 THE COURT: Good morning. It looks as though
10 there are a number of defense counsel who are not here, even
11 though defendants are here.

12 MR. COVERT: That is correct. I am standing in
13 for the remaining defense counsel, if you want to go through
14 them.

15 THE COURT: I got a list. I want to make sure I
16 got all of the folks straight. Is Mr. Willson here? All
17 right. Good afternoon.

18 DEFENDANT WILLSON: Do you want me to stand?

19 THE COURT: No, that's fine. I want to be able to
20 eyeball you, know who you are.

21 MR. COVERT: I'm standing in for Mr. Agro, your
22 Honor.

23 THE COURT: And is Mr. Pirk here?

24 DEFENDANT PIRK: Here.

25 THE COURT: Good afternoon, sir.

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2 MR. COVERT: I am standing in for Mr. Easton and
3 Ms. Meyers Buth, your Honor.

4 THE COURT: Mr. Enix, I don't think --

5 MR. COVERT: I don't think he is here, your Honor.
6 I've been asked by Mr. Connors to stand in for him, your Honor.

7 THE COURT: Mr. Caruso.

8 MR. COVERT: I am standing in for Mr. Pieri. Mr.
9 Caruso is here, front row, second person.

10 THE COURT: Good afternoon. Mr. Dekay.

11 DEFENDANT DEKAY: Right here.

12 MR. COVERT: I'm standing in for Emily Trott.

13 THE COURT: Mr. Williams, Jason Williams, he
14 is out of custody.

15 MR. COVERT: He is out of custody and I'm standing
16 in for Joseph Catalano.

17 THE COURT: And he is not here?

18 MR. COVERT: He is not present, your Honor.

19 THE COURT: Mr. Osborne.

20 MR. COVERT: And I have been asked by Andrew
21 Brautigam to stand in for him, your Honor.

22 THE COURT: Mr. -- I'm going to mispronounce it --
23 Olejniczak. Good afternoon. How do you pronounce that?

24 DEFENDANT OLEJNICZAK: Olejniczak.

25 MR. COVERT: I will stand in for Mr. Stachowski.

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2 THE COURT: Jack Wood.

3 MR. COVERT: I will stand in for Mr. Molloy.

4 THE COURT: Glen -- I'm not going to pronounce
5 that -- Mr. Okay represents him.

6 MR. COVERT: I've been asked by Mr. Okay to stand
7 in for him.

8 THE COURT: Mr. Mahoney and Mr. McIndoo is there.
9 Anybody we didn't call?

10 Let me state on the record, I know the defendants
11 who are in custody are in restraints right now. It's my
12 practice, actually, not to require that. I was asked by the
13 Marshal Service and told by them, frankly, we wouldn't be able
14 to go forward with the proceeding because of the number of
15 defendants who are in restraints. For purposes of today, we're
16 going to go forward with the defendants in restraints and we'll
17 see how we handle that going forward.

18 So, in any event, the matter is on for the appeal
19 that was filed by Mr. Scanlon's attorneys, but on behalf of all
20 of the defendants who are here with respect to Judge Roemer's
21 decision to deny the request for a scheduling order with
22 respect to Brady material. So, Ms. Dutta, it's your appeal, so
23 why don't you go forward?

24 MS. DUTTA: Thank you, your Honor. We're not
25 asking that you reweigh facts. Our position is that there are

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2 multiple permissible views on how this could come out and we're
3 asking to you take a different one. There is no reason not to
4 issue a pretrial Brady in this case. There are number of
5 reasons, the most significant of which is this is a complex
6 case. This is a 72-page indictment and encompasses 46 counts,
7 16 defendants are charged, two of whom have since pled. The
8 indictment itself is as a result of a multi-jurisdictional
9 investigation involving the FBI in Buffalo, Tennessee and
10 Florida, involved ICE, Homeland Security, the Erie County
11 Sheriff's Department, the Buffalo Police Department, the New
12 York State Police Department, and I don't think I'm naming them
13 all, your Honor. And the nature of that investigation suggests
14 that there is going to be potential Brady and Giglio term in
15 the hands of, multiple law enforcement agencies and discrete
16 agencies. And the crime itself, your Honor, is a
17 multi-discretionary crime. There are allegations of acts that
18 took place in Pennsylvania, Florida, and Georgia and various
19 places in New York State, it's not going to be feasible for
20 counsel to get on a plane.

21 THE COURT: Let me ask you a question. Because
22 this is an appeal from Judge Roemer's decision, so the standard
23 is that I would have to determine that his decision was clearly
24 erroneous or contrary to law. So the issue isn't so much maybe
25 whether or not I would have made a different decision to begin

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2 with. The issue is whether or not Judge Roemer exercised a
3 discretion here to deny the order was contrary to law or
4 clearly erroneous. And, I mean, how do you get over that
5 hurdle?

6 MS. DUTTA: Two things. The first being this is a
7 complex case. And a magistrate judge didn't address the nature
8 of the complexity in his decision denying the request. That is
9 the first part. And the second is the distinction between
10 Brady, Giglio and Jencks, the magistrate judge adopted the
11 government's that Giglio.

12 THE COURT: I've always called it Giglio, maybe
13 it's wrong, so in any event go ahead.

14 MS. DUTTA: Giglio material is Brady material,
15 that is black letter law. And I think it is the case and I
16 think the point that the government has tried to make is Giglio
17 is to be supplied at the same time as Brady. This is simply not
18 the case.

19 THE COURT: Why isn't that the case? The cases
20 I've read, Giglio material is required to be disclosed maybe
21 earlier than after the witness testifies are where you have a
22 witness who is the case for the government. The case rises and
23 falls on one particular witness. And without knowing the scope
24 of the impeachment material, the defense really isn't going to
25 have an appropriate opportunity to prepare for trial, which,

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2 obviously, Brady requires. I mean, why is this that type of a
3 case?

4 MR. TRIPI: Well, that is Giglio material, your
5 Honor. As you point out, that is Brady material and the rule
6 is it has to be disclosed in sufficient time for its effective
7 use for the defense in terms of this case how complex and how
8 many people involved and where the material is and where
9 defense counsel would have to potentially go to investigate
10 that material to effectively use it, which is not going to be
11 effective right before a witness testifies.

12 THE COURT: There is a little difference between
13 where we are right now, pretrial motions haven't been filed,
14 and having a witness testify.

15 MR. TRIPI: Absolutely, your Honor. We're just
16 asking for a pretrial order sufficiently in advance of trial.
17 We prefer it before pretrial motions are due because there is
18 simply no reason not to. The government hasn't claimed, at
19 least in this motion, that there is an issue of witness
20 intimidation or identification that could harm any person.
21 There is no factual predicate of that in this motion. There is
22 really no reason to not to put in an order and significant
23 reasons to put in an order, again, given the fact that not
24 putting in one could avoid avoidable delays and wreak havoc on
25 this Court's schedule and there is in reason to do that.

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2 THE COURT: Okay. Anything else?

3 MR. TRIPI: No, your Honor.

4 THE COURT: Okay. I will let you respond after we
5 hear from Mr. Tripi. Mr. Tripi?

6 MR. TRIPI: Does anybody else want to argue and
7 I'll respond in kind to everyone?

8 THE COURT: I guess I assumed Ms. Dutta was
9 arguing on behalf of all.

10 MR. COVERT: She is.

11 MR. MAHONEY: I have one thing to add.

12 THE COURT: I knew you would, Mr. Mahoney.

13 MR. MAHONEY: On the issue of the standard, it
14 really, first of all, the government will maintain and always
15 maintains that Brady did not create a right to discovery. That
16 is contrary to what I think other people interpret Brady to
17 mean. The reason I raise this point is that if you're thinking
18 in terms of the standard as being a normal, quote, "discovery
19 motion," that is brought based under referral of the magistrate
20 judge from the Article 3 judge, then, yes, there is that
21 standard in terms of how we review the magistrate judge's
22 order. But I think this stands on a different footing. The
23 defendants are seeking to implement their constitutional right,
24 which obtains under Brady and the decisions after Brady and
25 some decisions prior to Brady, and they are seeking to have

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2 judicial involvement to enforce that fundamental constitutional
3 right. And so I will borrow from the government's argument
4 it's not simply a discovery order, it's living up to
5 constitutional obligations of the defendant. The defendants
6 have the right to an Article 3 judge's determination on that
7 actual issue as to the extent to which the Court is going to
8 ensure that the government lives up to that obligation. And so
9 I think this stands on different footing.

10 THE COURT: How does that argument, though, fit in
11 with the fact is Brady is retrospective? So, in other words,
12 if, in fact, there is a Brady violation, that it really doesn't
13 become known until the time of trial and then the question is
14 whether or not it was provided sufficient time to prepare for
15 trial. And here we're looking at it, I mean what is being
16 requested is something going forward, and to essentially cut
17 off any potential constitutional violation.

18 MR. MAHONEY: Well, this is how the government has
19 succeeded, I guess, by relentless and tireless repetition of
20 the same thing for decades and has succeeded in distorting the
21 role of Brady and to what the government will say is Brady is
22 not a discovery case, it's a suppression case. It means there
23 will be a remedy if they're caught.

24 THE COURT: I think that is what the case law
25 says, too.

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2 MR. MAHONEY: Certainly it's a remedy if they are
3 caught, but that is on the appellate level. It doesn't mean
4 that on the trial level the government can cross its fingers
5 and say, we're not going to give you anything and hopefully we
6 hope that later on it's not proven to be important at a later
7 time. The Court, by buying into the argument, is encouraging
8 the government to take chances by adopting that standard, and
9 by not saying to the government, well, what do you have. And
10 as a pre-condition to deciding discovery issues, the Court,
11 judges tend to say, well, the government knows its obligations
12 under Rule 16 and knows its obligations under Brady. The
13 problem with that, if you look at the U.S. Attorney Office's
14 manual it defines Brady as evidence which, on its own, would
15 require an acquittal. Now, that is a very narrow
16 interpretation of Brady. And yet that is what the official
17 statement by the Department of Justice. So you cannot, a judge
18 cannot possibly say, as the magistrate judge tends to, well,
19 the government understands its Brady obligation. I don't think
20 they do. They certainly don't articulate in the papers what
21 their obligation is. They make the pat phrase, "we understand
22 the Brady obligation." Well, if you look at the U.S.
23 Attorney's Manual, it states a phrase which I doubt you agree
24 with them or I doubt many judges do, but very few look at it.
25 My concern is Brady, unless we say that Brady doesn't impose

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2 any argument on the obligation on the government to do anything
3 at trial, it's there in case they get caught, then why are we
4 talking about it? I think that most judges believe if it's a
5 due process right, it has. There is no such thing for a right
6 that only applies on appeal. There is no fundamental
7 constitutional right that only applies once there is a
8 conviction. It has to somehow apply at the trial level, it's
9 up to the trial judge to determine to ensure that right is
10 being followed. I don't think it's enough to say, well, the
11 government just sit down and say this is an appellate issue and
12 unless we get caught, you got nothing to say to us. I just
13 don't think that is the case. I think that totally dilutes the
14 responsibility of the judge to see to it that fundamental
15 constitutional rights that apply to trial are actually applied
16 at trial and not distorted into the idea that there is some
17 simple appellate remedy. There is no constitutional right that
18 I know of that only applies at the appellate level. It applies
19 at trial and it comes back to the Article 3 judge, not the
20 magistrate judge to make sure the rights are protected. The
21 fact the defense wanted to ask the magistrate judge, I don't
22 think, justifies any diluted review of the magistrate judge's
23 ability to grant that order.

24 THE COURT: Thank you. Mr. Tripi.

25 MR. TRIPI: Judge, in the defense papers, which

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2 they've all adopted, they concede that the standard is clearly
3 erroneous or contrary to law. We're here on the appeal of
4 Judge Roemer's decision denying pretrial disclosure Brady
5 order. That is what we're here for. We agreed with this
6 Court's suggestion and the defenses agreed with in their papers
7 is it is a clearly erroneous and contrary to law. The first
8 thing Ms. Dutta said there were multiple permissible views on
9 how this could have come out. And we're asking you to take a
10 different view stated a different way. The defense cannot and
11 has not established that Judge Roemer's decision was clearly
12 erroneous and contrary to law. In fact, what has been done in
13 this case and what is being done is exactly what is
14 Constitutionally required. Disclosures of exculpatory Brady
15 materials have been and will continue to be made in the event
16 they are discovered, found through reasonable diligence.

17 THE COURT: And in other words, the government's
18 position is that you're providing, quote, unquote, exculpatory
19 Brady material as soon as you're aware of it, but not
20 necessarily the impeachment type of Brady material.

21 MR. TRIPI: Yes, Judge. And I would take it even
22 further. I'm saying I'm taking a broad view of it. For
23 example, by way of example, I brought a brief example of
24 something I provided to counsel for Mr. Scanlon. There was a
25 witness who provided a statement to the FBI essentially saying

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2 that since the change in leadership at the clubhouse,
3 referencing the old man clubhouse, she has noticed drug use by
4 members and associates behind the clubhouse building. That is
5 not really exculpatory, that -- now that Scanlon is not the
6 boss of that drug house, they are noticing drugs outside of the
7 clubhouse, but in a broad view of it, I provide it. I guess
8 the argument or inference could be drawn, well, it wasn't like
9 that when he was the boss. Clearly that wouldn't stop drug use
10 or inside the clubhouse or things like that, but that is an
11 example of the type of thing that I have turned over and I
12 don't need a pretrial order to do that. I'm aware of my
13 obligations. If impeachment material doesn't rise to the level
14 of exculpatory information, things such as criminal histories,
15 plea agreements, things like that, all of that stuff gets
16 turned over in due course at the time of trial. In any trial,
17 I ever conducted in Federal Court, any trial I ever conducted
18 in state court and that is exactly what the law requires.
19 Things that rise to the level of exculpatory material or are
20 even close that stuff will be provided as I uncover it. And
21 I'd like to correct a couple of things that kind of dribbled
22 into the record at different points in time. Because the
23 defense has quoted me, as your Honor is aware, there was a
24 detention hearing regarding Mr. Enix before your Honor. And I
25 think in response to this Court's question and that situation,

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2 I said there was no Brady material. That was a response to as
3 it related to Mr. Enix at that time. Then in front of Judge
4 Roemer, I told him there was no Brady material. Actually that
5 was an error in my part because months earlier on June 7th,
6 when I provided voluntary discovery, I went back and looked at
7 what I provided. I provided things like notes from witnesses
8 and statements from the local police department when they did a
9 canvass and said, oh, it might have been so and so, or you're
10 such-and-such, short of rank speculation, you know, is that
11 exculpatory, maybe, maybe not, but that kind of stuff was
12 provided. When people said, oh, we speculate that the killer
13 of the two individuals who were murdered in this case is Mr.
14 Caruso, not -- they didn't say Mr. Jenkins, we now know Mr.
15 Jenkins has been convicted, but we still provided those types
16 of things where people speculated that it was Mr. Caruso who
17 committed the murder, so those things were in the discovery
18 already before any of the motions were filed, I continued to
19 review 302s and grand jury materials, and I made grand jury
20 disclosures. I'm well aware of my obligations, I plan to do
21 that. The defendants can't say they haven't received
22 disclosures because they know they have. We're going to comply
23 with our obligations. We've done so to this point. We
24 represented that to Judge Roemer and we represent it to this
25 Court.

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2 And as the Court pointed out, we're well in
3 advance of even a motion deadline much less trial. We'll
4 continue to review all of the information that comes to our
5 attention or is in possession of law enforcement, and we'll
6 make appropriate disclosures. But, on this appeal, Judge
7 Roemer didn't get anything wrong. It was not clearly erroneous
8 or contrary to law his decision. Essentially defense is asking
9 the Court to do what other courts have said is not required.
10 If you look at the Second Circuit decision in *Coppa*, if you
11 look at Judge Schroeder's decision that I quoted in *Hill*. His
12 quote in that Report and Recommendation was with respect to
13 impeachment material that does not rise to the level of Brady
14 material, such as Jencks statements. The prosecution is not
15 required to disclose and turn over such statements until after
16 the witness has completed his or her direct testimony.

17 Well, we're going to turn over Jencks material
18 before that point in time at the appropriate time. We're going
19 to turn over impeachment material before a witness testifies.
20 We do that in every case. We don't wait until somebody
21 testifies and then spring it on them. And I'm sure this court
22 will give appropriate deadlines and times for defense counsel,
23 if something were to come up in the middle of trial, everyone's
24 best efforts are being complied with and something comes up,
25 I'm sure this Court would give time for defense to review the

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2 material they think they needed earlier. But that is not
3 anyone's attention to hold out on things like that so that they
4 can't prepare themselves for trial.

5 And impeachment material that is solely
6 impeachment material is not the exculpatory material that we're
7 talking about where disclosures are required right now. I
8 submit anything that is marginally exculpatory, has been and
9 will be turned over.

10 THE COURT: Even if it's impeachment material
11 right now is your point?

12 MR. TRIPI: No, if it's strictly impeachment
13 material, no.

14 THE COURT: So if it's impeachment material that
15 is material to guilt, you turn it over now.

16 MR. TRIPI: Yes, correct. Sorry, I misunderstood
17 you, will do.

18 THE COURT: And that is your policy, that is your
19 practice and your office's policy.

20 MR. TRIPI: Yes. If we have impeachment material
21 that rises to the level of Brady, exculpatory because the case
22 rises and falls on one person or things like that, of course, I
23 turn that over. I submit that is not this case, but if that
24 were to be the case, it would be turned over.

25 THE COURT: Anything else, Mr. Tripi?

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2 MR. TRIPI: No, Judge, I rely on my papers.

3 THE COURT: Ms. Dutta, any response?

4 MR. TRIPI: Just a couple of things, your Honor.

5 I apologize if I did not speak clearly, but I did not mean to
6 suggest that we view there are multiple permissive views of the
7 evidence. I thought I said there are not multiple permissive
8 views of the evidence. The only one is not to enter a Brady
9 order in this case.

10 THE COURT: Do you have any case that provides for
11 an order requiring an order for Brady at this stage?

12 MR. TRIPI: No, not prior to pretrial motions.
13 But there is nothing preventing the Court from issuing such an
14 order. And to the extent the Court should be, after pretrial
15 motions and closer to trial, we're fine with that. We're
16 trying to get an order that sets a date certain that says we
17 have Brady and Giglio so we don't cause delays to the parties
18 and defendants and to this Court.

19 THE COURT: Anything else, Mr. Mahoney?

20 MR. MAHONEY: On that last issue, first of all,
21 the northern district there are a standing order for Brady
22 material to be provided within 14 days.

23 THE COURT: Fourteen days.

24 MR. MAHONEY: No. Arraignment, I think that is
25 the time, northern district. This is a judicial counsel, a

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2 report that was prepared I don't know if it was a group out of
3 the national judicial officer, but it was a report on Brady
4 practices around the country and it listed a number of
5 jurisdictions. I can send your Honor and all parties a
6 reference to that memorandum which listed different practices,
7 different districts with standing Brady orders right at the
8 very beginning of the case to sort of obviate all of this
9 question.

10 THE COURT: Could you?

11 MR. MAHONEY: I'll file a letter to the Court and
12 all counsel enclosing that.

13 THE COURT: Thank you.

14 MR. TRIPI: I would note if that pre dates *Coppa*
15 or *Coppa*, however you want to pronounce it, that would be
16 irrelevant.

17 MR. MAHONEY: *Coppa* is a Second Circuit decision,
18 we're talking other districts.

19 THE COURT: I'll take a look at it because I am
20 interested in it.

21 MR. TRIPI: Judge, I forgot one thing. On two
22 issues of this case being a complex case, this case is no other
23 complex than any other racketeering which I've tried multiple
24 RICO cases in federal courts. There were no orders to this
25 effect in those cases, so, and everything worked out just fine

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2 in terms of disclosures and everything like that. So this is
3 not out-of-the-box complex in that regard. In terms of witness
4 -- there was a reference as to witness harm and things of that
5 nature. I think, and I've argued this to Judge Roemer, the
6 indictment makes clear that there were concerns with respect to
7 witness intimidation, witness tampering, so I believe I
8 repeated, and in some of my filings before Judge Roemer as well
9 and we do have those concerns. Obviously if you provide all
10 impeachment information now, that is a tantamount to disclosure
11 of every government witness. We may not have any witnesses
12 that make it to a trial stage.

13 THE COURT: Okay.

14 MR. TRIPI: Thank you.

15 THE COURT: Thank you, Mr. Tripi. I'm going
16 reserve decision on this. I'll get a decision out as soon as
17 possible. Let me raise another issue and that is, Mr. Tripi,
18 you had copied me in on a letter that you had sent setting
19 September 30th.

20 MR. TRIPI: As a plea deadline.

21 THE COURT: Is that still the deadline?

22 MR. TRIPI: Yes.

23 THE COURT: And the pretrial discovery deadline in
24 this case is sometime in early December.

25 MR. TRIPI: I think they moved the motion deadline

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2 to December 7th.

3 THE COURT: What I want to do is set a date in
4 January for us all to get together and pick a trial date. I
5 know that pretrial matters are still going to be pending. At
6 this point, we got too many defendants in custody, as far as
7 I'm concerned, to wait until all pretrial motions have been
8 resolved to pick a trial date because we're going to have a
9 hard enough time, I think, as it is, working with everybody's
10 schedules to get a date. We'll set the date out far enough so
11 that it allows for any pretrial matters to be resolved but that
12 is what I would like to do.

13 MR. TRIPI: I agree and appreciate that, Judge.

14 THE COURT: So, what I'm going to do, and anybody
15 that is here right now can tell me if you're not available, but
16 my thought is we'll schedule this on January 12th, it's a
17 Thursday, 2 p.m. I'm going to issue an order indicating that
18 if defense counsel, for whatever reason, is not available on
19 that date, they need to have somebody here who knows their
20 schedule and can work with them to set a trial date.

21 The other issue that I want everyone to be
22 prepared to discuss, in addition to the length of the trial, I
23 mean, that is primarily going to fall on your shoulders, Mr.
24 Tripi, in terms of letting us know that, is talk about Rule 18
25 as well that talks about where the trial is actually held.

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2 Obviously this is a Buffalo case, my seat is in Rochester.
3 Most of the attorneys are in Rochester. I'm assuming most of
4 the witnesses are from this side of the district and I have not
5 yet tried a Buffalo case in Rochester nor am I suggesting that
6 I would insist on doing that here, but if we try this case
7 here, I'm not going to be able to do it five days. I'm going
8 to have to have one day where we're down and I'm back in
9 Rochester. I want you to be -- everybody to be prepared to
10 address that issue. But, also in estimating the trial length,
11 you need to take that into account.

12 MR. TRIPI: I'll begin looking at that now.

13 THE COURT: All right. Anything else, Ms. Dutta?

14 MS. DUTTA: No, your Honor.

15 THE COURT: Mr. Mahoney or Mr. Covert.

16 MR. COVERT: No, your Honor.

17 THE COURT: Mr. Tripi?

18 MR. TRIPI: No, your Honor. Thank you.

19 THE COURT: Thank you very much, everyone.

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the
record of proceedings in the above-entitled matter.

S/ Karen J. Bush, RPR

Official Court Reporter